83-571

Office-Supreme Court, U.S.
FILED
OCT 4 1983
ALEXANDER L. STEVAS,
CLERK

NO.

in the Supreme Court of the United States

October Term, 1983

ADALBERTO ARIAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

MAX P. ENGEL, ESQ.
Attorney for Petitioner
1461 N.W. 17th Avenue
Miami, Florida 33125
(305) 325-1810

QUESTION PRESENTED

DOES THE 6th AMENDMENT OF THE UNITED STATES CONSTITUTION REQUIRE THAT A DEFENDANT BE ALLOWED TO INQUIRE ON CROSS-EXAMINATION INTO THE ARREST RECORD OF THE PRIMARY WITNESS AGAINST HIM, WHERE THAT WITNESS, A GOVERNMENT INFORMANT, GAVE A MISLEADING, IF NOT INTENTIONALLY FALSE ANSWER TO A QUESTION AT TRIAL, THUS PLACING HIS OWN CREDIBILITY SQUARELY AT ISSUE?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PETITION	1
OPINION BELOW	2
STATEMENT OF JURISDICTIONAL GROUNDS	2
CONSTITUTIONAL PROVISION	3
STATEMENT OF THE CASE AND FACTS	3
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	21
APPENDIX	

TABLE OF AUTHORITIES

CASES	PAGE
Cheek v. Bates, 615 F.2d 559, 563 (1st Cir., 1980)	18
Cloud v. Thomas, 627 F.2d 742 (5th Cir., 1980)	20
Davis v. Alaska, 415 U.S. 308 (1974)	15, 18, 20
U.S. v. Alvarez-Lopez, 559 F.2d 1155, 1160 (9th Cir., 1977)	17
U.S. v. Berkowitz, 662 F.2d 1127, 1138 (5th Cir., 1981)	10
U.S. v. Croucher, 532 F.2d 1042, 1045 (5th Cir., 1976)	17
U.S. v. Fortes, 619 F.2d 108, 118 (1st Cir., 1980)	11
U.S. v. Opager, 589 F.2d 799, 803 (5th Cir., 1979)	15

NO.

In the Supreme Court of the United States

October Term, 1983

ADALBERTO ARIAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

Adalberto Arias, defendant/appellant below, respectfully petitions for a writ of certorari to review the judgment of the United States Court of Appeals, Eleventh Circuit, entered in these proceedings on June 3, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Eleventh Circuit, reproduced and attached hereto as Appendix A, is unreported. The judgment and sentence of the trial court with respect to Adalberto Arias is reproduced and attached hereto as Appendix B.

STATEMENT OF JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals, Eleventh Circuit, was entered on June 3, 1983. Adalberto Arias timely filed a Petition for Rehearing by the panel which was denied by order of July 29, 1983. The Petition for Rehearing and the order denying the petition for rehearing are attached hereto as Appendix C and D.

On August 8, 1983, Adalberto Arias filed with the United States Court of Appeals, Eleventh Circuit a Motion For Stay of Mandate which was granted by order of August 10, 1983. Copies of the Motion To Stay Mandate and the Order granting the motion are reproduced and attached hereto as Appendix E and F.

This Petition for Writ of Certiorari is filed within sixty days of the entry of the Order deying rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254, Rules 17.1 (a) and (c) and Rule 20, Supreme Court Rules.

CONSTITUTIONAL PROVISION

SIXTH AMENDMENT

Jury trial for crimes, and procedural rights

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE AND FACTS

On March 19, 1983, a ten count indictment was filed in the Southern District of Florida charging Adalberto Arias and eight other persons with conspiracy to possess and distribute methaqualone, and with the substantive offenses of distribution and possession with intent to distribute methaqualone. Arias was named in eight counts of the indictment.

On May 20, 1981, the trial court dismissed four of the counts. A judicially redacted indictment of four counts was fashioned, charging Arias and three co-defendants with conspiracy to distribute three hundred thousand methaqualone tablets, possessing nine and one-half tablets with intent to distribute them, distributing nine and a half tablets, and possessing seventy-two

thousand tablets with intent to distribute. The four redacted counts corresponded respectively with counts one, six, seven and ten of the original indictment. Jury trial commenced in May of 1981, however, Arias was not a Defendant in that trial. One of the defendants was granted a judgment of acquittal as to all counts. The jury was unable to reach a verdict as to the remaining three defendants, and the court declared a mistrial *sua sponte*.

Retrial commenced on July 14, 1981. Adalberto Arias was tried together with three co-defendants, Guivas, Menendez and Perera. Judgments of acquittal were granted as to all four defendants on counts two and three of the redacted indictment. However, defense motion for judgment of acquittal were denied as to counts one and four. During a recess in the cross-examination of the confidential informant, Peacock, defendants moved *in foro* to be permitted to ask Peacock about his prior arrests. The court denied the motion.

The court sent the case to the jury on the first and fourth counts of the redacted indictment, to-wit: conspiracy to distribute methaqualone from March 4 to March 12, 1980, and possession of methaqualone on March 12, 1980. The jury returned verdicts of guilty on both charges as to all four defendants. Arias was adjudicated guilty immediately following the verdict.

On September 17, 1981, the Court entered its written adjudication of guilt as to Counts One and Four of the redacted indictment and sentenced Arias to two years incarceration on both counts to run concurrently, to be followed by a special parole term of two years on Count Four, after the period of confinement.

Notice of Appeal was timely filed. Arias was allowed to remain on bond pending his appeal to the Eleventh Circuit. On June 3, 1983, the Eleventh Circuit entered a 13 page non-published opinion affirming Arias' conviction and sentence (Appendix A). Following the denial of the petition for hearing (Appendix C and D), the Eleventh Circuit granted a stay until October 7, 1983, pending the timely filing of this petition for writ of certiorari (Appendix F).

The record reflects that at noon on March 3, 1980, Gary Peacock and Charles Hudson met at the Miami Marina with Luis Delgado and his cousin Julio Baez. Hudson was an undercover agent of the Alcohol Tobacco and Firearms Bureau, and Peacock was a confidential informant/special employee of the Bureau.[1] They discussed the purchase of drugs, including methaqualone tablets. Peacock, who had met Luis Delgado some two years earlier, had set up the meeting. Two similar meetings were then held on the next day, March 4, 1980.

Pablo Delgado, one of Luis's brothers, said he had more than a million methaqualone tables coming in soon. Hudson and Peacock said they had a buyer, an Italian money man from New Jersey, who wanted to buy 300,000 methaqualone tablets. The money man was actually Special Agent Steve Leibowitz of the Miami ATF office.

---

[1]Hudson explained that a Special Employee is a paid undercover citizen informant who receives per diem expense payments plus a reward. Peacock testified that he earned $245 per week plus his reward, which was about $2,500 in this case. It was elicited on cross-examination of Special Agent Hudson that Peacock also works as a paid informant for the D.E.A.

On March 11, 1980, Hudson and Peacock met with Pablo and Clemente Delgado at a Miami bank. Also present was "New Jersey money man" Leibowitz with another ATF special agent posing as his bodyguard. Special Agent Leibowitz and Hudson took Pablo Delgado to the safe deposit box room where they showed him $500,000 in purported purchase money. That evening negotiations resumed at Pablo Delgado's residence, focusing on an initial sale of one hundred and seventeen thousand tablets. At this meeting, Pablo Delgado handed nine and a half tablets to Peacock as a sample of the impending sale.

The next day, March 12, 1980, Hudson and Peacock returned to Pablo Delgado's mobile home to take delivery of approximately one hundred thousand methaqualone tablets. Present were Pablo Delgado, his wife and child, and his brothers, Clemente and Luis Delgado. Differences arose regarding the manner of taking possession, and Hudson decided to send Peacock with Pablo Delgado to view the tablets purportedly being held by the source. Hudson remained at the mobile home with Clemente and Luis Delgado where they chatted, ate lunch and drank beers.

Delgado drove Peacock to a shopping center where they met Adalberto Arias. Arias directed them to an empty house in southwest Miami which Arias claimed to own. Arias told Peacock, who was wearing a recording device, that after a telephone call, a sale of at least one hundred thousand tablets would be arranged that day. Peacock and Arias also agreed on the sale of another two hundred thousand tablets to be completed the next day. Dropping Arias off at the shopping center,

Delgado and Peacock then returned to the mobile home to wait.

Upon returning, Pablo Delgado notified Hudson that there were delays in obtaining enough tablets for the deal, and that he had calls out to possible sources. At about 4:00 p.m., Delgado received a telephone call and once more took Peacock to purportedly view the tablets. Hudson again remained behind.

Pablo Delgado told Peacock that Arias was now at another house, and drove Peacock to the home of co-defendant Menendez. Arias was there, supposedly waiting for a source to deliver. Peacock was wired for transmitting and recording.

On the front porch, Arias stated that the house could be used for taking delivery of methaqualone tablets.

Co-defendant Castro arrived shortly thereafter in a red Camaro, followed by a gold Pontiac carrying co-defendants Perera and Guivas. Co-defendant Fernandez arrived in a pick-up truck. Arias told Peacock he was going for the tablets, and simultaneously Perera, Arias and Fernandez returned to their vehicles and left.

The pick-up truck and the Pontiac then returned to Menendez's residence. The Pontiac was parked on the front lawn with its trunk facing the front door. With the approval of Arias and Guivas, Peacock went to the trunk of the Pontiac and saw the tablets, taking two samples.

At about 6:30 Arias and Guivas arrived at Pablo's residence in the gold Pontiac. Arias was driving. Hudson asked where Pablo was, and Arias answered, "they are on the way." When Hudson asked, in essence "where is the stuff?"; Arias answered that it was in the car. Arias and Guivas took Hudson to the car, Guivas opened the trunk and showed Hudson the brown bag and the plastic bag containing white tablets. When they went back inside, Peacock and Pablo returned. Peacock announced that he was satisfied. They arranged for Pablo Delgado to go with Hudson and Peacock to the shopping center where the money man, Special Agent Leibowitz, was waiting with money. In addition to Leibowitz and his Special Agent bodyguard, other DEA and ATF surveillance agents were there. Pablo Delgado was arrested. Hudson returned to Pablo's residence and arrested Clemente Delgado, Adalberto Arias and co-defendant Antonio Guivas. Four other persons were arrested at the Menendez house.

Special Agent Hudson testified on cross-examination that it was only on March 12, 1980, that he had any contact with Adalberto Arias, and that his contact with Arias before the arrest was only three or four minutes.

REASONS FOR GRANTING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND OTHER FEDERAL APPEALS COURTS.

The question presented is whether a government informant/witness who is the key witness against the defendant, has an arrest record and gives misleading if not intentionally false testimony at trial, may be cross-examined about his arrest record, having placed his own credibility squarely in issue.

The Eleventh Circuit held that the defendants were not entitled to cross-examine informant/witness Peacock on his prior arrest record because the right to cross-examine, while of paramount importance, is not absolute; once cross-examination has been permitted to an extent sufficient to satisfy the defendant's Sixth Amendment rights, the judge's discretionary authority comes into play; and the standard for review is whether the district court abused its discretion in limiting cross-examination after weighing the probative value of the evidence against the risks of prejudice. Of course, these principles are sound. But their application to the record in this case mandates reversal, not affirmance of the conviction.

Cross-examination constitutes a vital component of the Sixth Amendment right of a criminal defendant to confront witnesses against him.

> Significant restrictions on cross-examination can eviscerate this right and compel reversal.

United States v. Berkowitz, 662 F.2d 1127, 1138 (5th Cir., 1981) (Unit B), citing *Davis v. Alaska*, 415 U.S. 308 (1974).

A. PEACOCK WAS THE STAR WITNESS AGAINST ARIAS

The record is clear that the case against Adalberto Arias depended primarily upon the testimony of Gary Peacock, a regularly employed paid citizen informant. Special Agent Hudson could only testify that he just met Arias and was with him for only three to four minutes before Arias was arrested on March 12, 1980.

Peacock, on the other hand was the Government's star witness. Peacock accompanied Pablo Delgado to the shopping center where they met with Arias early in the afternoon and went to a house with him; and then later went to Menendez's house and met with Arias again. Peacock was the Government's only witness with respect to Arias's whereabouts, activities and statements on March 12, 1980.

Accordingly, effective cross examination and impeachment of the witness Peacock was crucial to Arias's defense. Hudson's testimony of the events of March 12, 1980, must be carefully considered in the light that he drank so many beers during his afternoon

with the Delgados, that he passed out when he returned to his office and the rescue squad had to be called.

The credibility of the witness Peacock was the only factual issue for the jury to decide in this case. Where, as here, a case turns to a large extent on the credibility of one accusing witness, broad cross-examination of that principal witness should be permitted. *U.S. v. Fortes*, 619 F.2d 108, 118 (1st Cir., 1980).

Nonetheless, the trial court refused to permit defense counsel to inquire about a prior felony arrest of Peacock, even after Peacock gave a misleading, if not intentionally false answer to a question at trial.

B. THE COURT WOULD NOT ALLOW DEFENDANT TO ASK ABOUT PRIOR ARRESTS OR CRIMINAL BEHAVIOR

During the cross examination of Gary Peacock, the following colloquy took place:

A. I have never been convicted of a crime under any name, sir.

Q. You have never been convicted of any crime? Is that your testimony?

A. Yes.

Q. Not a misdemeanor?

MR. ABBOTT: I object to the question.

THE COURT: Sustained.

BY MR. TAKIFF:

Q. Were you ever convicted of a serious misdemeanor?

MR. ABBOTT: I object to the question.

THE COURT: Sustained.

Q. Were you ever convicted of a felony of any kind?

A. No, sir.

Q. Well, you are telling me what you think is a misdemeanor or a felony. Tell me what you were convicted of.

MR. ABBOTT: I object to the question.

THE COURT: Sustained.

Later in the cross examination, the counsel inquired whether Peacock had committed a felony in 1972. The Government's objection was sustained and the court instructed counsel to stay within the limitations of Rule 609 of the Federal Rules of Evidence. Counsel then inquired whether Peacock was arrested for a felony in 1980; the Government's objection was sustained. Then counsel attempted to elicit testimony from Peacock that he aided in marijuana smuggling in 1978, to demonstrate his background and character. The court precluded this inquiry.

C. THE COURT WOULD NOT ALLOW DEFENDANTS TO IMPEACH FALSE TESTIMONY WITH PRIOR ARREST RECORD

On cross examination by Arias's counsel, Peacock was asked about his employment as a paid informant with ATF and the DEA. Peacock responded:

> . . . I stated I would like to be a special agent when I first started, but I did not have the college degree and because of my age I wouldn't meet the requirements, sir
>
> * * *
>
> Because I would have liked to have been a special agent, sir.

Subsequently, out of the presence of the jury, the defense moved the court for permission to question and impeach Peacock regarding prior arrests. Counsel acknowledged the court's prior ruling limiting defense counsel to the boundaries of Rule 609, but went on to argue that Peacock's statements that he was not a DEA or ATF special agent because of lack of a college education was false. Certainly, Peacock knew that a felony arrest record would preclude him from being hired as a special agent.

This statement argued counsel, was volunteered by Peacock, deliberately leaving out his arrest record as the more probable primary factor in his not becoming a special agent; and this argued counsel, put Peacock's character and truthfulness at issue.

The veracity of the witness Peacock was critical to Arias, as the initial issue for the jury to determine in deciding his guilt or innocence. Accordingly, the trial court should have permitted defense counsel to inquire into his truthfulness by asking, at the very least, whether he was ever arrested.

If he answered yes, that would have ended the inquiry. If he denied having been arrested, however, then he could have been impeached.

D. DEFENDANT'S GENERAL INQUIRY SHOULD HAVE BEEN ALLOWED

The trial court should have allowed such inquiry for two reasons: First, Peacock was such an important part of the Government's case, the jury should have been fully apprised of his character; and the matter of arrest falls outside the scope of Rule 609. Second, once Peacock made the statement that he was not a special agent because of lack of education, impeachment certainly would have been proper.

Rule 608 (b) prohibits the use of specific instances of conduct to attack or support the witness's credibility, other than convictions of a crime as provided in rule 609. However, it is within the discretion of the trial court to allow such inquiry on cross-examination if it would be probative of truthfulness or untruthfulness. When Peacock indirectly placed his prior arrest record in issue before the jury, the court should have allowed the defendants to question him concerning that area.

Government counsel argued on Peacock's behalf that lack of sufficient education was probably the "reason in his own mind why he would not have qualified" to be a special agent. The trial court denied the motion to inquire into Peacock's arrest record, ruling that this area was tangential and neither probative nor relevant. Again, the defendants asked for leave to inquire into the witness Peacock's prior crimes which were not felonies, but the motion was denied.

This denial of cross-examination constitutes abuse of discretion and reversible error. Peacock's arrest record was important not only to demonstrate bias, ulterior motive and credibility, but also to show that he lied. Without cross-examination into this area, Arias was deprived of the most effective test of Peacock's credibility.

As stated in *U.S. v. Opager*, 589 F.2d 799, 803 (5th Cir., 1979), Rule 608 (b) "should not stand as a bar to the admission of evidence introduced to contradict, which the jury might find disproves, a witness's testimony as to material issues of the case."

The refusal to allow inquiry into Peacock's arrest record directly conflicts with the Sixth Amendment right to confrontation as construed by this Court in *Davis v. Alaska*, 415 U.S. 308 (1974).

In *Davis*, the defendant was convicted of grand larceny, based largely upon the testimony of one witness who placed defendant at the scene of the crime. The witness Green was a juvenile delinquent on probation at the time of trial. Defense counsel attempted to bring this out in cross-examination, but was not permitted to

do so, upon objection by the state. Writing for the Court, Chief Justice Burger reiterated the purpose of cross-examination. It is not only a test of the witness's preception and memory, but also a test of his credibility:

> A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.

415 U.S. at 316-17, citations omitted.

It may not be clear whether defense counsel could have developed a plausible theory regarding Peacock's motives beyond earning his reward, but that is not the issue here.

> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. *But we do conclude that the jurors were entitled* to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided a "crucial link in the proof . . . of petitioner's act."

415 U.S. at 317, citations omitted, emphasis added.

At 415 U.S. 318, the Court discussed the possible inferences which the jury might have drawn from the

limited cross-examination permitted in the matter, and held that in order to make such an inquiry effective, defense counsel should be permitted to elicit the facts necessary to draw the appropriate inferences relating to the witness's credibility:

> On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a "rehash" of prior cross-examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which the jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it . . .

Indeed, the 9th Circuit has held that "especially should great latitude be allowed when, as here, the key prosecution witness is also a professional informant." *U.S. v. Alvarez-Lopez*, 559 F.2d 1155 1160 (9th Cir., 1977). And in *U.S. v. Croucher*, 532 F.2d 1042, 1045 (5th Cir., 1976), it was held that denial of defendant's opportunity to inquire into the informer's criminal background was prejudicial to the defendant and required reversal.

In this case, as in *Davis, supra*, denying the defendant the opportunity to cross examine the informer Peacock "would be constitutional error of the first magnitude and no showing of want of prejudice would cure it.

The First Circuit has held that counsel is obliged in such a situation to make clear to the court why a particular line of inquiry is being pursued, *Cheek v. Bates*, 615 F.2d 559, 563 (1st Cir., 1980), but this is the only relevant limitation upon the scope of cross examination. This requirement was duly satisfied below. By limiting defense counsel's inquiries into Peacock's criminal offense and/or arrest background, the jury was left with the inference that the defense was engaging in the very kind of "baseless line of attack" which was mentioned in *Davis, supra*.

It should be noted that the principal competing interest in *Davis* was the state's interest in protecting the privacy of juvenile offenders. There was no showing of an analogous competing interest on Peacock's behalf.

E. THE COURT'S REFUSAL TO PERMIT IMPEACHMENT BY PEACOCK'S ARREST RECORD WAS AN ABUSE OF DISCRETION AND REVERSIBLE ERROR

Assuming for argument, that the trial court properly excluded defense counsel's first request to cross-examine Peacock about prior arrests and prior criminal behavior, once Peacock volunteered that he would have liked to be a special agent, but was unable to do so because "I did not have the college degree and because of my

age. . .", he placed his credibility in issue. In fact, Peacock had been arrested on a felony charge of receiving and selling stolen property in 1971, and it can be safely assumed that this was the real obstacle to his acquisition of an agent's badge. Moreover, Peacock deliberately falsified his testimony and excluded any mention of this fact. Once Peacock was caught in this obvious lie, he had put his capacity for truthfulness in question, and defendants had the right to expose the known untruth. Accordingly, defense counsel moved for permission to cross-examine Peacock regarding, simply, whether or not he had a prior criminal record, but the trial court found the question too attenuated to the issue of credibility, and denied the motion.

Yet, the record is clear that Peacock deliberately falsified his answer, that his credibility was critical to the Defendant Arias and that the jury could have been shown that he lied. Evidence that Peacock had been arrested on a felony charge would have directly negated the inferences of his self-serving character testimony regarding his law enforcement aspirations, and would more, importantly have focused directly on his personal credibility, and impeached it. While evidentiary questions are committed to the broad discretion of the trial judge, that discretion is limited. The Court's discretion was clearly abused in the court's limitation of brief and concise cross-examination regarding this critical issue at trial.

The defendants made it clear that they were not attempting to impeach the testimony of Peacock by a general and unrestricted attack on his character, but rather by conducting an exposition of the untruth, the false inference, that the key witness himself had created.

The heart of the issue is not whether Peacock had been arrested, but whether he deliberately skipped over that fact in answering a question. Once Peacock created the inference, the heretofore impermissible question regarding arrests changed from one of character to one of credibility and came within the scope of rule 611 (b), permission to cross-examine regarding "matters affecting the credibility of the witness." The jury was clearly entitled to have before it the evidence affecting this critical issue. *Davis v. Alaska, supra.*, 415 U.S. at 316-17 (1974).

This foreclosed line of inquiry was all the more relevant in light of the fact that the key Government witness had himself opened the door to this area by unnecessarily expounding on his law enforcement aspirations in rambling response to no question whatsoever regarding his character. Clearly, the witness himself opened the evidentiary door to his own credibility. A defendant is deemed to enjoy a Sixth Amendment confrontation right to an exploration into a witness's possible reasons for falsifying testimony. *Cloud v. Thomas*, 627 F.2d 742 (5th Cir., 1980).

The trial court's limitation of cross-examination thus violated both the Federal Rules of Evidence and the Sixth Amendment and reversal is warranted.

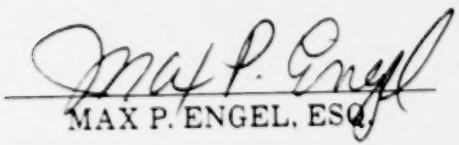
Because of this apparent conflict between the Eleventh Circuit's decision and the decisions of this Court and other federal appellate courts, and because of the significance of the Sixth Amendment right to effective cross-examination, it is important for this Court to review this decision of the Eleventh Circuit.

CONCLUSION

For the foregoing reasons, Petitioner, Adalberto Arais, respectfully prays that the Petition for Writ of Certorari to review the judgment of the United States Court of Appeals, Eleventh Circuit be granted.

Respectfully submitted,

MAX P. ENGEL, ESQ.
Attorney for the Petitioner
1461 N.W. 17th Avenue
Miami, Florida 33125
305/325-1810



MAX P. ENGEL, ESQ.

Appendix

APPENDIX

		Page
A.	Opinion of Eleventh Circuit, dated June 3, 1983	2
B.	Judgment and Sentence, Sept. 17, 1981	14
C.	Petition For Rehearing	15
D.	Order Denying Petition For Rehearing	19
E.	Motion For Stay Of Mandate	20
F.	Order Granting Stay Of Mandate	24

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 81-5946
Non-Argument Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ADALBERTO ARIAS, GERONIMO MENENDEZ,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(June 3, 1983)

Before HILL, KRAVITCH and HENDERSON,
Circuit Judges.

PER CURIAM:

The appellants, Geronimo Menendez and Adalberto Arias, were convicted of conspiracy and possession with intent to distribute methaqualone in violation of 21 U.S.C. §§841(a)(1) and 846 (1976). On appeal, they

challenge (1) the sufficiency of the evidence, (2) the government's failure to produce *Jencks* material relating to another investigation of their codefendants' activities and (3) the restrictions placed by the trial judge on their cross-examination. We affirm.

On March 3, 1980, Charles Hudson, a special agent with the Bureau of Alcohol, Tobacco and Firearms (ATF) and Gary Peacock, a paid confidential informant, met Luis Delgado and Julio Baez at the Miami Marina. The four discussed the purchase of methaqualone (quaaludes) and other narcotics. Peacock, who had known Delgado for approximately two years, had arranged the meeting. The following day, they met again with Baez and Luis Delgado, this time at the Pit Bar-B-Que. Luis' brothers, Pablo and Clemente, were also present. The men negotiated the purchase of 300,000 methaqualone tablets. One week later, Pablo gave Hudson and Peacock some samples of the drugs, and they, in turn, exhibited to Pablo and Clemente Delgado $500,000.00 in a safety deposit box, indicating that were prepared to consummate the sale. Also present at the bank were two additional ATF agents, one posing as the New Jersey "money man," the other as his bodyguard.

The next day, March 12, 1980, Peacock and Hudson went to Delgado's residence to "purchase" the quaaludes. Peacock was wearing a "body bug." Minor complications arose when Pablo and his companions asked to see the money beforehand, but the agents insisted on obtaining the drugs first. Peacock left the house with Pablo, while agent Hudson remained with Clemente and Luis Delgado. At this point, the appellant, Adalberto Arias, met Pablo and Peacock at a shopping center, where

Pablo introduced Arias as the source of the quaaludes. The three men then drove to a sparsely furnished house that Arias had purchased to use for the exchange of narcotics. After making a few telephone calls, Arias assured the men that he could deliver 110,000 pills that day and 200,000 the next. They separated, and Peacock and Pablo rejoined Hudson and the others who were waiting at the Delgado residence. Following a telephone call at 4:00 p.m., Pablo and Peacock again departed, this time going to the house of the appellant, Geronimo Menendez. Both Arias and Menendez were present and stated that the drugs were en route and that the sale could take place at Menendez' house. Several others soon arrived. Arias introduced one of them, Raul Castro, as his main source of quaaludes. Subsequently, when Peacock asked to see the drugs, Arias open the trunk of a gold Pontiac. Peacock examined the quaaludes. Then Arias drove a companion, Antonio Guivas, to Pablo Delgado's house in the gold Pontiac. Clemente Delgado and agent Hudson met them at that address, and Arias showed Hudson the pills. Peacock and Pablo soon came upon the scene, and the activity reached a climax. Pablo accompanied agent Hudson and Peacock to a shopping center "to get the money." Hudson then arrested Delgado and turned him over to drug enforcement officers and ATF surveillance agents, who had been awaiting his arrival. Hudson rushed back to the Delgado residence, where he arrested Clemente Delgado, Adalberto Arias, and Antonio Guivas. The Pontiac and the quaaludes were confiscated. Another agent went to Geronimo Menendez' house and arrested him and four others.

The appellants were indicted on March 19, 1980 in the Southern District of Florida[1] and charged with conspiracy, possession with intent to distribute and distribution of methaquaalone. Arias pleaded guilty to conspiracy, but eventually withdrew his plea after sentencing was postponed. Some of the counts were dismissed by the court on May 20, 1981,[2] and the government filed a four-count redacted indictment alleging the same basic offenses. Menendez and three codefendants were tried in May, 1981, but a mistrial was declared when the jury was unable to reach a verdict. The retrial, with Arias added as a defendant, was held on July 14, 1981. Menendez, Arias, Guivas, and Perera were found guilty and sentenced to varying terms of imprisonment or probation. Only Menendez and Arias have pursued this appeal.

Both appellants claim that the evidence was insufficient to support their convictions. In reviewing this contention, we must consider the evidence as a whole and draw all reasonable inferences in favor of the government. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Rogers*, 701 F.2d 871, 873 (11th Cir. 1983); *United States v. Cuni*, 689 F.2d 1353 (11th Cir. 1982). It is not necessary that the evidence exclude every reasonable hypothesis of

---

[1]Also indicted were Pablo Delgado, Luis Delgado, Clemente Delgado, Antonio Guivas, Raul Castro, Lazaro Fernandez, and Guillermo Perera. Fernandez was acquitted, Castro did not appear for trial, and the indictment against Clemente Delgado was dismissed. The others pleaded guilty or were convicted and have not appealed.

[2]Counts II, III, VIII, and IX of the original indictment were dismissed by the court.

innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt. *United States v. Lee*, 695 F.2d 515, 517 (11th Cir. 1983); *United States v. Bell*, 678 F. 2d 547, 549 (5th Cir. Unit B) (en banc), *cert. granted*, ____ U.S. ____, 103 S.Ct. 444, 74 L.Ed.2d 600 (1982). In this instance, Hudson and Peacock negotiated with Arias and Menendez with respect to the sale of methaqualone. Arias alleges, nonetheless, that the government's case against him fell short of proving an essential element of conspiracy—an agreement. In order to prove a conspiracy, it must be shown that the conspirators knowingly agreed to join others to bring about a common illegal goal. *Lee*, 695 F.2d at 518; *Cuni*, 689 F.2d at 1356; *United States v. Ballard*, 663 F.2d 534 (11th Cir. 1981). Arias argues that he was not even present during the discussion prior to March 12, 1980, and that there was no direct meeting of the minds. The evidence is clear, however, that Arias discussed the sale and delivery of quaaludes with Pablo Delgado and Gary Peacock. Arias did not balk when he was introduced as a main source of the pills. Although he did not actually meet with the agents or the informant before March 12, 1980, he was a key figure in the events of that day. A defendant may be found guilty of conspiracy even if he plays a minor role in the total scheme. *Lee*, 694 F.2d at 518. Moreover, the existence of an agreement can be proved by circumstantial evidence and may be inferred from conduct. *United States v. Smith*, 700 F.2d 627 (11th Cir. 1983); *United States v. Kopituk*, 690 F.2d 1289 (11th Cir. 1982). The jury's conclusion that Arias knowingly and voluntarily agreed to participate in the conspiracy is supported by sufficient evidence.

Menendez urges that he was a mere spectator of the events occurring on his lawn and in his driveway on March 12, 1980. He stood on his front porch and watched his companions open the trunk of a car to verify the existence of the drugs. Informant Peacock testified that Mendendez stated he would "sleep with" the pills that were to be delivered the following day. Without disclaiming his promise to deliver drugs after March 12, Menendez insists that his own wrongful acts had not surfaced at the time of his arrest. It is well established, however, that the government is not required to prove that each conspirator participated at every stage of the conspiracy, nor is proof of any overt act necessary to convict a defendant of a narcotics conspiracy. 21 U.S.C §846 (1976). *Cuni*, 689 F.2d at 1356. Rather, the prosecution needs only show that the defendant knew of the conspiratorial goal and that he voluntarily participated in helping to accomplish that purpose. *Lee*, 695 F.2d at 518. We are satisfied there was sufficient evidence of Menendez' knowing participation adduced at the trial.

Both appellants also assert that there was no proof that they possessed methaqualone. As stated, when Arias and Menendez were with Peacock at Menendez' house, they both assured him that the drugs could be delivered to him there. Later, the quaaludes were actually brought by car to Menendez' front yard while Menendez watched and discussed the delivery of drugs. Arias opened the trunk of the car to display the pills and later drove that car to Delgado's home where he again revealed the contraband in the trunk. Either actual or constructive possession of illegal drugs is sufficient for conviction. *United States v. Marszalkowski*, 669 F.2d 655 (11th Cir.

1981), *cert. denied*, 103 S.Ct. 208 (1983); *United States v. Riggins*, 563 F.2d 1264, 1266 (5th Cir. 1977), *cert. denied*, 439 U.S. 878 (1978). Possession needs not be exclusive; it may be shared with others. *United States v. Ocanas*, 628 F.2d 353 (5th Cir.), *cert. denied*, 451 U.S. 984 (1980). These facts are sufficient to demonstrate that Arias and Menendez shared the possession of methaqualone with their coconspirators.

The appellants next complain that the district court erred in refusing to allow defense counsel to inquire into the arrest record of the informer, Peacock. Peacock was the key prosecution witness, and the defendants were entitled under the confrontation clause of the sixth amendment to cross-examine him. Defense counsel is entitled to elicit facts from which the jury can evaluate the witness' reliability. *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347, 354 (1974). This right to cross-examine, while of paramount importance, is not absolute. "Once cross-examination has been permitted to an extent sufficient to satisfy the defendant's Sixth Amendment rights, the trial judge's discretionary authority comes into play." *United States v. Kopituk*, 690 F.2d 1289, 1337 (11th Cir. 1982); *Greene v. Wainwright*, 634 F.2d 272, 275 (5th Cir. 1981). As this circuit stated in *United States v. Bulman*, 667 F.2d 1374, 1381 (11th Cir. 1982), the standard for review is "whether the district court abused its discretion in limiting cross-examination after weighing the probative value of the evidence against the risks of prejudice," *citing United States v. Diecidue*, 603 F.2d 535, 551 (5th Cir. 1979); *United States v. Bass*, 490 F.2d 846, 858 n. 12 (5th Cir. 1974). *See also, United States v. Tolliver*, 665 F.2d 1005, 1008 (11th Cir. 1982), *cert. denied*, 102 S.Ct. 1991 (1983).

Here, counsel for the appellants repeatedly attempted to question the informer, Peacock, about his arrest record.[3] Although Fed.R.Crim. P. 609 permits impeachment of a witness by evidence of his prior criminal convictions, cross-examination into mere arrests is generally not permitted unless probative of the witness' truthfulness or untruthfulness. The appellants allege that Peacock's own testimony opened the door to his character and credibility and that the trial court erred in foreclosing exposition of a false inference created by Peacock. Specifically, Peacock was asked on cross-examination whether he was being paid by the government "for lying, acting and testifying" as an undercover informant. Record at 444. He replied that his job could be summed up that way. Then defense counsel asked Peacock whether the government had made any deals with him, and whether his "lifelong ambition" was to be "a paid-for-profit special employee." Record at 445. In response, Peacock testified, "I stated I would like to be a special agent when I first started, but I did not have the college degree and because of my age I wouldn't meet the requirements, sir." *Id.* In a subsequent bench conference,[4] defense counsel explained to the court that Peacock must have known that the reason he did not become a special agent was, to a large extent, because he had a prior arrest record. Therefore, claimed the defense, Peacock excluded a critical fact and, hence, put his character for truthfulness in question. The appellants claim that "[t]he key to the

---

[3]Peacock had been arrested sometime earlier on a felony charge of receiving and selling stolen property. He was not convicted.

[4]For the exact colloquy that ensued during the bench conference, see Record at 460-66.

issue was not whether Peacock had been arrested, but whether he deliberately skipped over that fact in answering a question." Brief of Appellant—Arias at 22. The government urged that there were probably many reasons in Peacock's mind why he could not be a special agent, and that defense counsel's attempt to use Peacock's response "that he was not qualified" as a means of getting in "through the back door" to impeach him concerning arrests would be an unfair reading of the testimony. After weighing the conflicting contentions, the trial judge responded,

> [T]he Court has to note and observe that very appropriately counsel have placed squarely in issue Mr. Gary Peacock's credibility and all of you have done that so far that have cross-examined, which has been extensive and proper.
>
> I recognize that they have made it a very serious issue with the jury. I have not prevented that from being done. As a matter of fact, I think I leaned over backwards to let it go as far as it did go in many respects, and it was repetitive.
>
> I, however, cannot see where the inquiry that you seek to make is that probative or relevant. It is so tangential that I could think of another 10 areas that you could open up on credibility examination, if this one were permitted. I am not saying credibility doesn't warrant the widest possible latitude. I recognize it does. However, this is too attenuated. I am going to deny the motion.

Record at 465

In determining whether this denial of cross-examination amounted to an abuse of discretion, we must consider whether the appellants were unjustifiably precluded from impeaching the credibility of this crucial witness. A review of the testimony discloses that defense counsel questioned Peacock about his prior arrests (Record at 338-39, 353-54), his other extrinsic acts (Record at 359-60), his practice of "lying" and "acting" as an infiltrator (Record at 442-44), his possible greed (Record at 344) and his other motivations for cooperating with the government (Record at 337-38, 445). We conclude, therefore, that the appellants had a constitutionally adequate opportunity to cross-examine the prosecution's key witness, and the district court did not err in refusing to permit further inquiry into Peacock's prior arrest record.

Finally, the appellants charge that the district court erred by failing to order the government to turn over copies of an investigation involving their codefendants, the Delgados, in a federal firearms violation case. During cross-examination, Peacock testified that he had scanned a report that agent Chuck Hudson had prepared describing the Delgados' illicit weapons activities. Record at 480-82. Outside the presence of the jury, the trial court discussed the matter with counsel to determine whether the material should have been provided to the defense pursuant to the provisions

of the Jencks Act.[5] That statute requires the government to produce any statement in its possession relating to the subject matter of the testimony of a witness who has taken the stand for the prosecution. The trial judge read the report, found it to be unrelated to this case, and ordered the clerk to seal it. Record at 492. It is the duty of the trial court to determine whether statements are subject to production under the Jencks Act. *United States v. Conroy*, 589 F.2d 1258, 1273 (5th Cir.), *cert. denied*, 444 U.S. 831 (1979). Our review is limited to whether the district court's decision was clearly erroneous. *United States v. Cathey*, 591 F.2d 268, 274 (5th Cir. 1979). Moreover, the judge "who presided at the trial is uniquely situated to make both this [ruling] and the determination of whether failure to require production of the questioned statement to appellant, if error, might have been prejudicial." *Lloyd v. United States*, 412 F.2d 1084 (5th Cir. 1969); *see also, Campbell v. United States*, 373 U.S. 487, 493, 83 S.Ct. 1356, 10 L.Ed.2d 501 (1963). Having considered the arguments of the parties,

---

[5]The Jencks Act, 18 U.S.C. §3500(b) (1976) codifies the holding in Jencks v. United States, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957). It provides:

> After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

and having reviewed the record, we cannot state that the district court was clearly erroneous in denying the disclosure of this material.

The judgments of conviction are

AFFIRMED.

United States of America vs.

United States District Court for

DEFENDANT: ADALBERTO ARIAS

THE SOUTHERN DISTRICT OF FLORIDA

DOCKET NO. ▶ 80-115-CR-SMA

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date ▶ MONTH: September DAY: 17 YEAR: 1981

___ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

X WITH COUNSEL Hugo Dimond, Esq.
(Name of counsel)

PLEA

___ GUILTY, and the court being satisfied that there is a factual basis for the plea. ___ NOLO CONTENDERE X NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of ___ NOT GUILTY Defendant is discharged / X GUILTY

Defendant has been convicted as charged of the offense(s) of: In violation of Title 21, USC, Section 846 and 841(a)(1), and Title 18, USC, Section 2; as charged in Counts One and Four of the Redacted Indictment.

SENTENCE OR PROBATION ORDER

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of: TWO (2) YEARS as to each of Counts One and Four, or until otherwise discharged by due process of law, said sentences of confinement are to run concurrently with each other, it being further

ORDERED AND ADJUDGED that the Defendant shall serve a special parole term of TWO (2) YEARS as to Count Four, following period of confinement.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

COMMITMENT RECOMMENDATION

The Court orders commitment to the custody of the [illegible]

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

[illegible]

SIGNED BY

X U.S. District Judge

___ U.S. Magistrate

Date

265

SIDNEY M. ARONOVITZ

September 17, 1981

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 81-5946

ADALBERTO ARIAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING BY PANEL

LAW OFFICES OF
MAX P. ENGEL
Attorneys for the Appellant Arias
1461 N.W. 17th Avenue
Miami, Florida
305/325-1810

Appellant, ADALBERTO ARIAS, through his undersigned attorney pursuant to Federal Rules of Appellate Practice 40 files this his Petition For Rehearing and in support states:

The Court has overlooked and misapprehended the law and facts regarding the cross-examination of the paid government informant in this case for the following reasons:

In order for the trier of fact to make a reasonable, just and fair decision it must have all the relevant facts and testimony. In this case the Appellant was prevented from presenting all the relevant facts, because he was prevented from effectively cross-examing the governments main witness.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to cross-examine witnesses against him. This right is essential to a fair trial any limitation thereupon seriously jeopardizes this right.

It is becoming increasingly common for the government to hire for pay and other consideration former drug traffickers, users or dealers. These people with criminal backgrounds and experience then participate in criminal activity, when arrests are made they are used as witnesses against co-participants who have not yet made a deal with the government.

This practice is repugnant to most Americans, hiring former criminals to participate in criminal activity to deceive, mislead and induce others to participate in criminal activity, may be an efficient method to obtain

convictions but it is not a laudable one. Because of this type of witness's background, motivation and participation in the criminal activity, justice requires the court permit broad cross-examination of said witness. These witnesses should be subject to a most thorough scrutiny so that the truth may be known.

The court by limiting the cross-examination sets a dangerous precedent. Convictions by hired guns, who are not only paid but also protected from in depth cross-examination is a serious degradation of our legal system. This mistake should be remedied immediately, by reversing the trial court's ruling.

In conclusion it is our opinion that this Court has missapprehended the constitutional right of cross-examination of witnesses as it applies to the facts of this case and in so doing has denied the appellant a fair trial. Limiting the cross-examination of the government's paid informant in this case precluded the appellant from presenting all the facts to the jury that were necessary for it to make a reasonable, just and fair decision. This increasingly common practice is an affront to the integrity of our legal system and sets a dangerous precedent for the continuing erosion of our constitutional guaranteed rights to confront adverse witnesses and have fair impartial trials. The Court's decision also promotes the dubious government practice of using "hired-guns" to gain criminal arrests and convictions.

WHEREFORE, Appellant demands this Court grant this Petition for Rehearing and reverse and remand this cause for trial, forthwith.

LAW OFFICES OF
MAX P. ENGEL
Attorneys for the Appellant Arias
1461 N.W. 17th Avenue
Miami, Florida
305/325-1810

BY_____
MAX P. ENGEL, ESQ.

CERTIFICATION

I, HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition For Rehearing was mailed to the United States Attorney's Office, 155 South Miami Avenue, Miami, Florida, and Jose J. Larraz, Jr., Assistant Federal Public Defender, Attorney for Appellant, Gerinimo Menendez, 14 N.E. First Avenue, Miami, Flroida 33132 this 20th day of June, 1983.

_____
OF COUNSEL

[FILED JUL 29 1983]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 81-5946

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ADALBERTO ARIAS,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING

(July 29, 1983)

Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

IN THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

NO. 81-5946

ADALBERTO ARIAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

MOTION FOR STAY OF ISSUANCE OF MANDATE

Appellant, ADALBERTO ARIAS, through counsel and pursuant to Rule 41 of the Federal Rules of Appellate Procedure and Rule 27 of the Rules of the Eleventh Circuit, files this Motion For A Stay Of The Issuance of The Mandate and states:

1. On June 3, 1983, this Court entered its opinion affirming the conviction of the appellant.

2. Appellant timely filed a petition for rehearing which was denied by order of the Court dated July 29, 1983.

3. Pursuant to Rule 41, supra, the mandate issues seven (7) days from the denial of a motion for rehearing. However, counsel for appellant did not receive the Court's order denying the motion for rehearing until Friday, August 5, 1983, which was the seventh day to file a motion to stay issuance of the mandate. Counsel's office immediately telephoned the Clerk's office and explained the situation to Deputy Clerk June Phillips.

Ms. Phillips advised that that due to the circumstances the mandate would be witheld until Tuesday, August 9, 1983 to allow appellants time to file this motion. This motion is being prepared on an emergency basis for filing by Tuesday, August 9, 1983.

4. Appellant believes that there are three substantial grounds on which they should seek review by Petition for Writ of Certorari in the United States Supreme Court. Appellant files this motion in good faith and not for purposes of delay.

5. Appellant believes that the three grounds on which he will seek a writ of certiorari present important substantial questions which should be passed upon by the Supreme Court and that the questions are not frivolous. One of the questions presents an issue of conflict between the opinion in this case and a landmark decision of the Supreme Court; the other presents an important issue concerning federal constitutional rights:

I.

THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENSE COUNSEL TO INQUIRE INTO PEACOCK'S ARREST RECORD IN VIOLATION OF THE 6th AMENDMENT RIGHT TO CONFRONT WITNESSES AND THE FEDERAL RULES OF EVIDENCE.

II.

THE TRIAL COURT ERRED IN FAILING TO ORDER THE GOVERNMENT TO PROVIDE THE DEFENSE WITH A WITNESSES'S STATEMENT IN VIOLATION OF THE JENCKS ACT AND IN FAILING TO SANCTION THE GOVERNMENT FOR ITS NON-COMPLIANCE WITH THE STANDARD DISCOVERY ORDER.

III.

THE TRIAL COURT ERRED IN DENYING APPELIANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL MADE DURING TRIAL AND APPELLANT'S POST TRIAL MOTION FOR JUDGMENT OF ACQUITTAL OR MOTION FOR NEW TRIAL.

6. Appellant requests that the Court permit him to remain free on bond on the same terms and conditions as he has been observing since he was first arrested. As the record reflects, the Appellant has always appeared in court when he was required or requested to appear.

7. Appellant intends to pursue Supreme Court relief with all due diligence.

WHEREFORE, Appellant respectfully prays that this Court grant this Motion and stay issurance of the mandate, pending the filing of his Petition for Writ of Certiorari in the United States Supreme Court and will allow him to remain free and continue on the same bond he has been on pending his appeal in this Court.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Motion was mailed to the United States Attorney's Office, 155 South Miami Avenue, Miami, Florida, this 8th day of August, 1983.

LAW OFFICES OF
MAX P. ENGEL
Attorneys for the Appellant
1461 N.W. 17th Avenue
Miami, Florida
305/325-1810

BY_____
KURT R. KLAUS, JR., ESQ.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-5946

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED

AUG 10 1983

Spencer D. Mercer
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ADALBERTO ARIAS,
GERONIMO MENENDEZ,

Defendants-Appellants.

- - - - - - - - - - - - -

Appeal from the United States District Court for the
Southern District of Florida

- - - - - - - - - - - - -

O R D E R :

( ) The motion of Appellant(ADALBERTO ARIAS) for [X] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of Appellant(ADALBERTO ARIAS) for [X] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including October 7, 1983, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ ALBERT J. HENDERSON
UNITED STATES CIRCUIT JUDGE

MDT-4
(Rev. 6/82)